No. 02-241

IN THE
Supreme Court of the United States

BARBARA GRUTTER,

PETITIONER,

V.

LEE BOLLINGER, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF ON BEHALF OF HILLARY BROWNE, DANIELLE CONLEY, NADINE JONES FRANCIS, ROBIN KONRAD, AND THE STUDENTS OF HOWARD UNIVERSITY SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The students of Howard University School of Law submit this brief as *amici curiae* in support of the University of Michigan Law School, urging this Honorable Court to affirm the Sixth Circuit's ruling that the University's race-conscious admissions program serves the compelling governmental interest of attaining a diverse student body and that its policy is narrowly tailored.[1]

Howard University School of Law opened its doors in 1869 with the goal of ensuring that any student, regardless of race, gender, or national origin, seeking a legal education would be afforded that opportunity. Our law school became a training ground where students, most notably Supreme Court Justice Thurgood Marshall, learned to affect the change necessary to realize the ideals of American democracy. These legal pioneers were instrumental in *Brown v. Board of Education*, 347 U.S. 483 (1954)—the landmark decision that ended *de jure* segregation in public schools and paved the way for a more inclusive society.

Nearly fifty years after *Brown*, Howard University School of Law continues its legacy of pursuing social justice and promoting diversity in the classroom and within the legal profession. As the nation's population becomes increasingly diverse,

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[1] This brief is submitted with the consent of the parties. Pursuant to Supreme Court Rule 37.6, counsel represent that this brief was not authored or paid for in whole or in part by counsel for any party. Petitioners and respondents have filed with the Clerk letters granting blanket consent to any party filing an *amicus* brief in support of either petitioner or respondent.

we recognize the importance of being able to work in a multicultural society and the centrality of diversity to law schools' roles in setting the American educational and social agenda, particularly as it affects underrepresented communities. While the student population at Howard University School of Law is primarily composed of people of color, each of us has previously had significant exposure to the majority, whether through the undergraduate institutions that we attended,[2] the neighborhoods in which we were raised, or simply as a function of being minorities in America. Howard University School of Law students have a direct stake in the outcome of this case and respectfully request that this Honorable Court find that the University of Michigan Law School's race-conscious admissions program serves a compelling governmental interest and is narrowly tailored to fulfill that interest.[3]

SUMMARY OF ARGUMENT

The Sixth Circuit correctly held that the University of Michigan Law School's race-conscious admissions program is a constitutionally permissible means of attaining a racially diverse student body,

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[2] In the entering class of 2002, 71.24% of Howard University School of Law students attended predominantly white universities.

[3] Although we believe that the University of Michigan Law School's admissions policy is narrowly tailored, this brief will focus primarily on why the Law School's use of a race-conscious admissions program to obtain a racially and ethnically diverse student body is a sufficiently compelling interest to satisfy strict scrutiny.

and the program is narrowly tailored to achieve that interest. A university's consideration of race in an effort to create diversity in the classroom is one of the special circumstances in which racial classifications are constitutionally permissible. Diversity is a compelling governmental interest because it furthers the goal of societal integration articulated in *Brown* and provides students who lived in racial isolation prior to entering college with the opportunity to interact with students of different races. In addition, diversity in the law school classroom fosters an environment in which misconceptions regarding race can be challenged and dispelled. When law students are exposed to a variety of perspectives, they are better prepared to relate to and empathize with racially and culturally diverse clients. Diversity also promotes harmonious relationships between minority and non-minority attorneys, which will likely improve minority retention in the public and private sectors. Finally, racial diversity is a compelling governmental interest because race-neutral alternatives do not achieve the goal of assembling a student body that will accurately reflect the increasing diversity of the United States.

ARGUMENT

I. THE UNIVERSITY OF MICHIGAN LAW SCHOOL'S CONSIDERATION OF RACE IN ITS ADMISSIONS PROGRAM TO ACHIEVE A DIVERSE STUDENT BODY IS A COMPELLING GOVERNMENTAL INTEREST.

The use of racial classifications is constitutionally permissible in special circumstances. A university's use of racial classifications to create a diverse student body is one such circumstance. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978);[4] *see also Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1197 (9th Cir. 2002); Mike Allen, *Rice: Race Can Be Used As a Factor in Admissions*, Wash. Post, Jan. 18, 2003, at A1 (quoting Condoleezza Rice's assertion that there are circumstances when "it is appropriate to use race as one factor among others in achieving a diverse student body"). Announcing the judgment of the Court in *Bakke*, Justice Powell determined that educational diversity is a constitutionally compelling interest, which permits a university to consider race

[4] Five Justices concluded that a university's consideration of race is constitutional, albeit for different reasons. Justice Powell concluded that the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions, while Justices Brennan, Marshall, Blackmun, and White concluded that "[the] purpose of remedying the effects of past societal discrimination is...sufficiently important to justify the use of race-conscious admissions program." *Bakke*, 438 U.S. at 362.

as a factor "in attaining the goal of a heterogeneous student body." *Bakke*, 438 U.S. at 314.

Opponents of racial classifications in both remedial and non-remedial settings rely on the notion of a color-blind Constitution as support for the proposition that discrimination on the basis of race, whether invidious or benign, is constitutionally impermissible. *See Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (asserting that the "Constitution is color-blind, and neither knows nor tolerates classes among citizens"); *see also* U.S. Const. amend. XIV, § 1. The notion that the government should *never* be allowed to consider race, however, ignores not only the history and original intent behind the enactment of the Fourteenth Amendment,[5] but also the current realities of racial segregation, discrimination, and racial disparities in education and the workplace. As noted by Justice O'Connor, "[t]he unhappy persistence of both practice and the lingering effects

[5] The Fourteenth Amendment, and specifically the Equal Protection Clause, was originally enacted to protect newly freed slaves from the "hostile legislation of the States" after the Civil War. *Slaughter-House Cases*, 83 U.S. (1 Wall.) 36, 55 (1872). Although the protection afforded to individuals under the Equal Protection Clause is no longer limited to "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), the Court will undermine the clause's original purpose should it adopt a color-blind approach. As noted by Justice Marshall, "[W]e are not all yet equals, in large part because of the refusal of the *Plessy* Court to adopt the principle of colorblindness. It would be the cruelest of irony for this court to adopt the dissent in *Plessy* and now hold that the University must use color-blind admissions." Memorandum from Thurgood Marshall, to Conference, April 13, 1978, Brennan Papers, Box 465, at 2-3.

of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). Although Justice O'Connor refers to the use of racial classifications that are remedial in nature, her assertion dispels the idea of a Constitution that sees no color and supports the proposition that there should be special circumstances in which a state actor can constitutionally consider race. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (noting that "a state interest in the promotion of diversity has been found sufficiently 'compelling', at least in the context of higher education, to support the use of racial classifications in furthering that interest").

The University of Michigan Law School's race-conscious admissions program is a constitutional means to obtain the benefits that flow from a racially and ethnically diverse student body. In *Bakke*, Justice Powell recognized that the "robust exchange of ideas" that will inevitably result from a diverse student body will benefit both minority and non-minority students. 438 U.S. at 312. Following this "diversity rationale," the majority of the nation's colleges and universities have employed race-conscious admissions programs to promote interaction, familiarity, and mutual understanding between students of different races and ethnicities in an effort to "prepar[e] [students] for participation as a political equal in a pluralist democracy." Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1774 (1996). Although racial classifications by their very nature raise concerns of

constitutional fairness and equality, in the context of education such classifications are a constitutionally permissible method for universities and colleges to best prepare their students to live comfortably and work efficiently in a racially diverse country.

In considering the race of its students when selecting its entering class, the University of Michigan Law School not only promotes and encourages societal integration, but also provides the nation's future leaders with the opportunity to learn how to work effectively in a country that is becoming increasingly multicultural. The University of Michigan Law School's ultimate goal of creating a racially diverse environment in which law students can consider and appreciate a variety of perspectives is constitutionally compelling because of the positive impact that such an environment will have on both minority and non-minority law students in the classroom and when they ultimately enter the profession. When law students are exposed to a variety of perspectives and viewpoints before entering the public or private sector, they are better equipped to advocate for and empathize with their clients.

II. THE UNIVERSITY OF MICHIGAN LAW SCHOOL'S CONSIDERATION OF RACE TO ACHIEVE STUDENT DIVERSITY FURTHERS *BROWN*'S GOALS OF SOCIETAL INTEGRATION, AND RACIALLY DIVERSE CLASSROOMS FOSTER AN ENVIRONMENT FOR STUDENTS TO CHALLENGE THEIR MISCONCEPTIONS ABOUT RACE.

Through constitutional efforts to ensure a racially diverse student body, the University of Michigan Law School and many other institutions of higher learning have successfully achieved the goals envisioned by the *Brown* Court and subsequent desegregation orders. In abolishing *de jure* segregation in public schools, the *Brown* Court was concerned not only with the inherent inequality of maintaining separate educational facilities for black and white children, but also with the educational benefits that could ultimately be derived through interracial interactions in the classroom. *See generally* 347 U.S. at 494 (noting that segregation deprives black children "of some of the benefits they would receive in a racial[ly] integrated school system").

Despite the Court's landmark decision in *Brown* and laws that were enacted as a direct result of the Civil Rights Movement, racial segregation in public education, housing, and other social domains remains an unfortunate reality.[6] These problems

[6] *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381, 420 (1998); *see also* Expert Report of Thomas J. Sugrue, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), *in The Compelling Need for Diversity in Higher Education* [hereinafter Sugrue Report], *available at* http://www.umich.edu/~urel/admissions/legal/expert (noting that the "vast majority of White primary and secondary school students have no significant contact with Black, Hispanic, or American Indian students in the classroom"); Institute of Medicine, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* 73-80 (Brian D. Smedley et al. eds., 2002) (pre-publication copy).

have kept schools, neighborhoods, and the nation as a whole segregated, notwithstanding judicial and legislative efforts to the contrary. Consequently, this segregation has impacted primary and secondary education and prevented both minorities and non-minorities from receiving the benefits that flow from exposure to a diversity of perspectives. The use of a race-conscious admissions program by the University of Michigan Law School is necessary to provide the opportunity for the robust exchange of ideas that occurs in a racially diverse educational setting.

A. Justice Powell's Diversity Rationale in *Bakke* Is a Continuation of the Ideals Inherent in *Brown*.

One of the primary reasons that Justice Powell determined that a university could constitutionally consider race in an effort to obtain a diverse student body was because of the positive effect that such an environment would have on the nation as a whole. He asserted that "the nation's future depends on leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of

many peoples." *Bakke*, 438 U.S. at 313 (citations omitted). Justice Powell's diversity rationale encompasses the principle underlying the Court's rationale in *Brown* and its progeny—that the "robust exchange of ideas" resulting from interaction between students of different races in the classroom is essential to a quality education and will ultimately help "to prepare students to live in a pluralistic society." *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 16 (1971); *see also Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 486 n.5 (1979) (Powell, J., dissenting) ("[I]t is essential that diverse peoples of our country learn to live in harmony and mutual respect. This end is furthered when young people attend schools with diverse student bodies."). Through the implementation of race-conscious admissions programs, schools such as the University of Michigan Law School achieve the benefits of racial diversity compelled by *Brown* and re-articulated by Justice Powell in *Bakke*.

Interaction between students of different races and ethnicities is often severely limited prior to their matriculation into college. After almost fifty years since this Court's decision in *Brown*, "whites and minorities seldom live in the same neighborhoods." Sugrue Report, *supra* note 6, at 3. While this decision effectively precluded government-sponsored segregation, individuals who are resistant to change have found ways to circumvent the principles of *Brown* by choosing to continue to live in racial isolation. As this Court noted in *Freeman v. Pitts*, 503 U.S. 467, 495 (1992), the Constitution cannot effectively address the re-segregation that has occurred as a result of private choice. *See also id.* at 502 (Scalia, J., concurring) (noting that most people

prefer "to reside near people of [their] own race or ethnic background"). Forced integration at the primary and secondary school levels may have ended state-enforced segregation in public schools, but it has not prevented Americans from segregating themselves. *See Penick*, 443 U.S. at 485 (Powell, J., dissenting) (stating that "compulsory integration [has resulted in]...a substantial exodus of whites from the system"). However, when selective institutions of higher learning employ race-conscious admissions programs they can successfully bring students of all races and ethnicities together in the classroom, breaking the pattern of racial isolation. Thus, a university's use of race to achieve a diverse student body is not a concept that is new to the courts. The "diversity rationale" is merely a continuation of the ideals inherent in *Brown* and its progeny.

B. A Racially Diverse Student Body Allows Law Students to Challenge Racial Stereotypes, Fosters Harmonious Relationships Among Students of Different Races, and Encourages Students to Examine the Law From Different Perspectives.

Through race-conscious admissions programs, universities encourage students from different walks of life to challenge their ideas about race that result from being raised in a segregated society.[7] In

[7] *See* Expert Report of Patricia Y. Gurin, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), *in The Compelling Need for Diversity in Higher Education* [hereinafter Gurin Report], *available at* http://www.umich.edu/~urel/admissions/legal/expert (noting

discussing the consequences of racial and ethnic divisions in the public educational system, expert Thomas Sugrue noted that racial homogeneity in the classroom "allows stereotypes and myths to flourish, because the students lack direct evidence to contradict their erroneous impressions." Sugrue Report, *supra* note 6, at 3. Therefore, it is imperative that institutions of higher learning, at the undergraduate and the professional level, assemble a racially heterogeneous student body to provide both minority and non-minority students with the opportunity to interact with students of various racial and ethnic backgrounds and the opportunity to challenge their beliefs about race. College students bring with them the racial stereotypes that they have learned; upon graduation, "they will take those same assumptions, misconceptions and knowledge gaps into the domain of public decision making, *unless our colleges and universities make deliberate efforts to foster racially diverse learning environments.*" Liu, *supra* note 6, at 422 (emphasis added). It is important for institutions of higher learning to create an educational environment that promotes cultural awareness and understanding to "provide students with opportunities to bridge the racial gaps that continue to divide our nation." *Id.* The University of Michigan Law School's use of race in its admissions program is not discrimination to right a past wrong, but instead functions as a method to help students acknowledge and heal the wounds created by

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that most students that attend the University of Michigan and other selective universities come from schools and neighborhoods that are largely segregated).

centuries of racial separation and cultural misunderstandings, which continue today.

In acknowledging that racial and ethnic diversity in educational settings is "essential to the quality of higher education," Justice Powell rightly stressed that the entire nation benefits from students who are widely exposed to a myriad of ideas and perspectives. *Bakke*, 428 U.S. at 312. This is certainly true in the context of legal education. Administrators at law schools across the country have recognized the benefits that result from a racially diverse student body. Lee Bollinger, the former dean at the University of Michigan Law School, has determined that "[h]aving a racially diverse class enables a law school to do a better job of preparing students to be effective lawyers." Lee Bollinger, *Seven Myths About Affirmative Action in Higher Education*, 38 Willamette L. Rev. 535, 541 (2002).

Several studies have demonstrated that the benefits of racial diversity are concrete, not conjectural or hypothetical.[8] For example,

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[8] *See generally* William Bowen & Derek Bok, *The Shape of the River* 218-25 (1998) (indicating that for more than 150 years, educational experts have stressed the educational value of diversity in higher education); Ann Springer, American Association of University Professors, *Update on Affirmative Action in Higher Education: A Current Legal Overview, at* http://www.aaup.org/Issues/AffirmativeAction/aalegal.htm (updated Jan. 2003) (presenting evidence that the benefits of diversity are not merely anecdotal).

[9] *See* Bowen & Bok, *supra* note 8, at 267; *see also* Roland Garcia, *Strength Through Diversity*, The Houston Lawyer, Mar. 2002, *available at* http://www.thehoustonlawyer.com/aa_mar02/aa_presi/presi.htm ("Students who are exposed to people with diverse backgrounds and ideas become better

Alexander Astin and Mitchell Chang have found that student exposure to racial diversity in the classroom has a positive impact on the way in which students view race. *See* Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population*, 40 J. College Student Dev. 391 (1999); Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected*, Change, Mar.-Apr. 1993, at 44. These studies and others have determined that racial and ethnic diversity in the classroom increases cultural understanding, encourages students to think critically, and fosters harmonious relationships between students of different races and ethnicities.[9]

In addition to the studies conducted by experts in the educational arena and the professional opinions of legal scholars, professors, and administrators at the nation's most selective law schools, the Supreme Court has also acknowledged the importance of a diverse law school environment to the legal

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critical thinkers, and show greater social and interpersonal development."); Lani Guinier, *Colleges Should Take 'Confirmative Action' in Admissions*, The Chronicle Review, Dec. 14, 2001, at B10 (Lee Bollinger, quoted in the article, proposed that "people learn more and learn better in an environment where they are part of a mix of people where there are substantial differences, with people not like themselves." Bollinger also noted that "understanding race in America is a powerful metaphor for crossing sensibilities of all kinds.").

profession. In *Sweatt v. Painter*, 339 U.S. 629 (1950), the pre-*Brown* Court ruled that the University of Texas Law School was required to admit black students, stressing the importance and educational value of racial diversity. The Court stressed that a "law school ... cannot be effective in isolation from individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of idea and exchange of views with which the law is concerned." *Id.* at 634; *see also McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950) (determining that the University of Oklahoma's restrictions on black students' use of school facilities did not allow them to receive an effective education because of their inability "to engage in discussions and exchange views with other students").

Racial diversity in the classroom not only fosters an environment of racial understanding, but also challenges the misconception that racial discrimination is no longer an issue in the United States. *See* Liu, *supra* note 6, at 434. Such an understanding is imperative to law students because "the law is not an abstract concept removed from the society it serves," but should be used as a tool to "narrow the gap between the ideal of equal justice and the reality of social inequality." Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1218 (1992). A racially diverse law school environment forces students to confront the role that race plays within the legal system, and the ways in which people from various racial and ethnic backgrounds have been

affected by the laws and by those who enforce them. *See* Roscoe J. Howard, Jr., *Getting it Wrong:* Hopwood v. Texas *and Its Implications for Racial Diversity in Legal Education and Practice*, 31 New Eng. L. Rev. 831, 877-78 (1997). The elimination of race-conscious admissions programs will significantly decrease the opportunity of white students to gain insight into the way many people of color perceive the legal system, which will inevitably affect the way in which such students assess the realities of racism and its relationship to the law. "[R]epresentation of minority members who have suffered injustices at the hands of our legal system" not only will enrich classroom discussion, but also will provide law students with opportunities to view the laws "through the eyes of those with a different perspective." *Id.* at 877.

A powerful example of the importance of racial diversity in the legal profession is the role of racial diversity on the Supreme Court. In a tribute to Justice Marshall, Justice O'Connor discussed how Justice Marshall's position on the Court allowed her to gain insight into the plight of people who encounter racial discrimination on a continuous basis. *See* O'Connor, *supra*, at 1219. Acknowledging the benefits of diversity, she noted: "Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a *special perspective....*" *Id.* at 1217 (emphasis added). Justice O'Connor stressed the importance and the validity of diverse viewpoints on the Court, noting that Justice Marshall's stories constantly reminded her that "the law is not an abstract concept removed from the society it serves" and that such stories could possibly "change the way [she] see[s] the

world." *Id.* at 1220. For the very same reasons, it is critical to the success of law students that they are exposed to a variety of viewpoints that are often shaped by an individual's race—for those viewpoints can change the way in which students view the law and perhaps, like Justice O'Connor, change the way in which they see the world.[10] *See id.*

III. THE UNIVERSITY OF MICHIGAN LAW SCHOOL'S CONSIDERATION OF RACE IN ITS ADMISSIONS PROGRAM ADVANCES EFFECTIVE CLIENT REPRESENTATION BY ENSURING THAT FUTURE ATTORNEYS ARE EXPOSED TO A VARIETY OF PERSPECTIVES PRIOR TO ENTERING THE WORK FORCE.

[10]Opponents of race-conscious admissions programs subscribe to the notion that using race as a factor in admissions is stereotypical and relies on "the crude, and dangerous proxy of race for ideological diversity." *Johnson v. Bd. of Regents of the Univ. of Ga*, 106 F. Supp.2d 1362, 1374 (S.D. Ga. 2000). Although it is not our contention that there is a monolithic Black community, or simply one "minority viewpoint," it is not a fiction that a person's race often affects his or her perspectives on a variety of issues. *See* Expert Report of William Bowen, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), *in The Compelling Need for Diversity in Higher Education* [hereinafter Bowen Report], *available at* http://www.umich.edu/~urel/admissions/legal/expert; *see also* Mike Allen, *Rice: Race Can Be Used As a Factor in Admissions*, Wash. Post, Jan. 18, 2003, at A1 (Condoleezza Rice noted that "[i]t's hard to talk about life experiences or the experiences of an individual without recognizing that race is a part of that.").

The absence of significant numbers of minorities in law schools adversely affects the practice of law by reducing attorneys' ability to effectively represent their clients. Without an opportunity to interact with people of different races and ethnicities in the classroom, possible misconceptions and assumptions about race can carry over into the workplace and thus prevent a client from receiving truly effective counsel.

According to Census Bureau projections, by the year 2050, people of color will comprise more than 45% of the United States' population.[11] Despite these projections, minority representation in the legal profession is not growing at rates similar to that of the population.[12] In addition, law school enrollment among minorities, which had steadily

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[11] U.S. Bureau of the Census, Current Population Reports, *Population Projections of the United States by Age, Sex, Race and Hispanic Origin: 1995 to 2050*, at http://landview.census.gov/prod/1/pop/p25-1130/ (Report P25-1130, 1996). The African American population will likely number in excess of 61 million, nearly double its size in 1995. By 2010, the Census Bureau projects that the Hispanic American population will be the second largest ethnic group in the country, and after 2020, the Hispanic population is projected to add more people to the U.S. population than all other ethnic groups combined. *Id.*

[12] Elizabeth Chambliss, American Bar Association, *Miles to Go 2000: Progress of Minorities in the Legal Profession*, 1 (2000). In 1990, only 7.6% of all lawyers were from racial and ethnic minorities: 3.4% African American, 2.5% Hispanic, 1.4% Asian American and 0.2% Native American. Subsequent data indicates that between 1990-1998 African American and Hispanic representation in the profession increased by a mere 0.5%, and similar gains are attributed to Asian Americans and Native Americans, indicating an increase in minority representation to 10% of the legal community. *Id.*

grown for many years, has stagnated since *Hopwood v. Texas*, 78 F.3d 932 (1996), where the Fifth Circuit determined that the University of Texas Law School could not consider an applicant's race to achieve a diverse student body.[13]

As students at Howard University School of Law, we recognize that "[a] lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." *Model Rules of Prof'l Conduct*, Pmbl. (1999). As such, lawyers have the principal duty to zealously and effectively represent their clients' interests by recognizing and understanding their clients' needs. The importance of client empathy and cross-cultural understanding has been widely recognized.[14] While the micro benefit to cultural understanding is the

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[13] *See generally* Jorge Chapa & Vincent A. Lazaro, *Hopwood in Texas: The Untimely End of Affirmative Action in Chilling Admission: The Affirmative Action Crisis and the Search for Alternatives* 55 (Gary Orfield & Edward Miller eds., 1998) (showing decline in minority enrollment in Texas law schools after *Hopwood*).

[14] *See generally* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L. Rev. 33 (2001) (Director of Clinical Education and Associate Professor of Law at CUNY asserting the reasons necessary for cross-cultural training); Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345 (1997) (Professor at University of Florida College of Law arguing that an attorney's ability to effectively represent her client often hinges on her ability to consider and address cultural or racial impediments); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 Fla. Coastal L.J. 219 (2002) (Associate Professor of Law at Touro College Law Center noting that racial and cultural awareness is critical to effective representation).

ability to "improve representation of clients," the macro benefit is to ultimately "help build a more just legal system." Bryant, *supra* note 14, at 36.

As students at a historically Black law school, we have a special interest in the University of Michigan Law School's race-conscious admissions program, which takes the initial steps needed to ensure that both minority and non-minority attorneys can productively interact with each other and with diverse clients. The University of Michigan Law School's consideration of race to create a diverse student body fosters and promotes the idea of cross-cultural competence—namely, the ability to understand and interact with those from different racial, ethnic, and cultural backgrounds. T.K. Bikson & S.A. Law, RAND, *Global Preparedness and Human Resources: College and Corporate Perspectives* 26-28 (1994). To maintain the integrity of the legal profession, it is critical that attorneys have exposure to different cultural perspectives prior to entering the workplace.

A. A Law School's Consideration of Race in Its Admissions Program Promotes Fair Representation of Clients Within the Public Legal Sector, Maintains Client Confidence, and Strengthens Public Notions of Fairness.

Race-conscious admissions programs help to preserve public confidence in the legal system by producing future lawyers who are able to relate to an increasingly diverse society. Consistent with notions of effective client representation and cultural understanding, the United States Department of Justice ("DOJ") maintains that "[d]iversity in the

administration of justice is vital to the faith and trust the American people have in their legal system."[15] Deputy Attorney General Larry Thompson has stated that "the [DOJ] must build and retain an attorney work force that ... appropriately reflects the diversity of our society." *DOJ Announces Contract*, *supra* note 15. Over the past several years, the DOJ has implemented programs that enhance diversity in the workplace to improve citizen confidence in the judicial system.

In June 2000, former Attorney General Janet Reno established an Eight-Point Plan to Enhance Diversity "to ensure that individuals from all diverse groups in our society can participate to the fullest degree in employment and advancement opportunities in the Department." Memorandum from Attorney General Janet Reno, For Heads of Department Components and For All United States Attorneys (June 16, 2000), *at* http://www.usdoj.gov/jmd/eeos/8PTPLAN.PDF. Within its definition of diversity, the DOJ includes, among other things, "persons of different races, colors. ethnic backgrounds, [and] national origins." *Id.* at 1. n.2. Three years after Reno's Eight-Point Plan was implemented, the need for diversity is still an issue. Because of the DOJ's commitment to "maintain[ ] a qualified and diverse work force to enhance the *integrity and performance* of the Justice Department." Attorney General John Ashcroft has

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[15] *Department of Justice Announces Contract Award for Analysis of Diversity in Its Attorney Workforce*, Jan. 16, 2002 [hereinafter *DOJ Announces Contract*] (United States Attorney General John Ashcroft emphasizing the need for diversity), *at* http://www.usdoj.gov/opa/pr/2002/January/02_ag_015.htm (last visited Jan. 19. 2003).

employed a consulting firm to evaluate problems and make recommendations to improve the DOJ's diversity. *DOJ Announces Contract*, *supra* note 15 (emphasis added).

One significant duty with which the DOJ is charged is monitoring our nation's criminal justice system. Unlike civil defendants, the personal freedom of criminal defendants is at stake. For this reason, the need for effective client representation and fairness within the criminal justice system is even more profound. Unfortunately, the reality is that "[r]acial disparities appear at virtually every point in the criminal justice system" and these disparities reflect the disparate social and economic conditions that exist beyond the criminal justice system. David Cole, *No Equal Justice* 139 (1999).

It is fundamental that attorneys who are part of the public sector are culturally competent to ensure fairness and justice. The students at Howard University School of Law seek to uphold a legal system that promotes justice for minorities in accordance with our school mission. We recognize that this cannot occur without a cultural understanding of clients. The use of race-conscious admissions programs in law schools helps to assure that the fundamental rights of people in America are not compromised by attorneys who have no cultural understanding of their clients.

B. Without Significant Exposure to Racially and Ethnically Diverse People, Leading Law Firms and Corporations Will Retain Attorneys Who Are Ill-Equipped to Effectively Serve Their Clients in Today's Global Economy.

Through the policies adopted by leading American law firms, it is evident that diversity is not simply welcomed, but is necessary for success within a business institution. In fact, the top firms have made statements of commitment to diversity within their institutions.[16] Successful law firms are aware that, if they fail to promote an environment receptive to racial diversity and fail to hire attorneys who are cross-culturally competent, they will have difficulty successfully competing in society, both in representing their clients and in retaining quality lawyers.

Similarly, corporations have discovered the benefits of diversity to both their work environments and their profit margins. As a result, by 1995, nearly half of all U.S. employers had established some type of diversity program. *See* American Management Association, *Managing Cultural*

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[16] *See, e.g.*, Cravath, Swaine & Moore, Our People, *at* http://www.cravath.com (last visited Jan. 19, 2003) (noting that "over 25 percent [of summer associates] were from minority groups"); Wachtell, Lipton, Rosen & Katz, Minority Recruitment, *at* http://www.wlrk.com/WLRK/Recruiting.cfm?ID=24 (last visited Jan. 16, 2003) (indicating that the "firm is committed to recruiting a diverse and talented body of lawyers"); Sullivan & Cromwell, *at* http://www.sullcrom.com/display.asp?section_id=91 (last visited Jan. 16, 2003) (naming ethnicity as one of several indications of the firm's diverse attorney base); Skadden Arps, Hiring Process, *at* http://www.skadden.com/recruiting/attorneys_hiring_main.html (last visited Jan. 16, 2003) (seeking attorneys "from diverse racial, religious and ethnic backgrounds"); Davis Polk & Wardwell, Our Lawyers, *at* http://www.dpw.com/recruiting/ourlawyers.htm (last visited Jan. 19, 2003) (announcing the award for the "second-highest overall diversity among the 250 largest U.S. firms" in conjunction with a commitment to diversity).

Diversity (Jan.1995), *at* http://www.amanet.org/research/archives.htm. Polls of top executives at Fortune 500 companies have shown that management views diversity as an important part of business.[17] For example, Ford Motor Company recognizes the revenue potential of marginalized groups and has developed a new diversity advisory council so that it can accurately reflect population trends and remain competitive, and ensure that all of its employees are cross-culturally competent. *See* K. Terrell Reed, *Ford Bets on Black, Automaker is Hoping to Capitalize on African American Spending*, Black Enterprise (July 2002).

For those law school graduates who pursue a career with a law firm or a corporation, either as in-house counsel or in some other capacity, prior experience interacting with individuals from as many backgrounds and with as varied experiences as possible will be a key component to their success. The University of Michigan Law School's implementation of a race-conscious admissions program ensures that a greater number of future employees will experience this exchange of ideas prior to entering the work force.

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[17] Society for Human Resource Management (SHRM), *Fortune 500 Firms Outpace the Competition with Greater Commitment to Diversity*, (reporting the positive results of SHRM Survey of Diversity Programs), *at* http://www.shrm.org/press/releases/980803.htm (last visited Jan. 19, 2003). Additionally, Dupont President and CEO, John A. Krol remarked, "Diversity in our company is itself a business imperative vital to our ongoing renewal and our competitiveness into the 21st century." Steven A. Ramirez, *Diversity and the Boardroom*, 6 Stan. J.L. Bus. & Fin. 85, 86 n.3 (2000) (quoting John A. Krol) (citations omitted).

C. In the Absence of Race-Conscious Admissions Programs, Minorities in the Legal Profession Will Enter an Unwelcoming, Unfamiliar, and Potentially Hostile Work Environment That Will Likely Result in Low Retention Rates.

Many students at Howard University School of Law will enter the legal profession in an environment where the majority of our peers are white lawyers who have attended predominantly white law schools.[18] Minorities who enter the legal profession often face barriers that are a direct result of racial stereotypes and misunderstandings by their non-minority co-workers. While most large firms have expressed a commitment to diversity, those same firms have difficulty retaining attorneys from racially diverse backgrounds. The high attrition rate among minority attorneys at law firms presents yet another reason that law schools have an interest in assuring a racially diverse student body.

A recent article examining the minority retention rates at Cleary, Gottlieb, Steen & Hamilton, a prominent New York law firm, found that most former African American associates felt that they experienced "subtly different expectations, opportunities, and treatment" in comparison to their white counterparts. Alan Jenkins, *Losing the Race*, Am. Lawyer (Oct. 4, 2001). In addition, these associates described how they were perceived to be

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[18] According to Howard University School of Law, Office of Career Services, 43.7% of graduates from 2001 and 45.3% of graduates from 2000 entered into private practice. (Statistics on file at Howard University School of Law, Office of Career Services).

incompetent, [19] which was reflected in the distribution of work assignments. *Id.*

The experience of African American associates at Cleary Gottlieb underscores the value of a diverse learning environment as a way for all law students to overcome misconceptions and assumptions about each other. In the absence of such race-conscious admissions programs, many students will not have the opportunity to challenge certain attitudes and stereotypes that are formed and hardened by isolation from the realities of racism in American society. Because 86% of associates and 96.1% of partners at top law firms are white,[20] it is inevitable that graduates of Howard University School of Law working in top firms will interact professionally with white graduates from majority white law schools. For this reason, we have an interest in ensuring that interaction in the workplace is not the first time that our colleagues at firms have been exposed to people of color.

The University of Michigan Law School's use of a race-conscious admissions program provides an opportunity for discussions about race, and its role in

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[19] Between one-half and three-quarters of white Americans believe that African Americans are less intelligent than whites and other minorities. *See* Institute of Medicine, *supra* note 6, at 9.

[20] Brian Zabcik, *Diversity Scorecard: Measuring Up (And Down)*, Minority L.J. (Spring 2002), *available at* http://www.minoritylawjournal.com/spring02/texts/measuring.html. The breakdown within minority percentages of associates was: 6.9% Asian Americans; 4.1% African Americans; 2.8% Hispanic; and 0.2% Native Americans. The breakdown within minority percentages of partners was: 1.3% Asian Americans; 1.4% African Americans; 1.2% Hispanics; and 0.1% Native Americans.

the law and in society. The students at Howard University School of Law believe that the use of race-conscious admissions programs positively impacts the practice of law by providing a forum in which diversity is a natural component of legal education. All students have the opportunity to become cross-culturally competent when they are immersed in a racially and ethnically diverse learning environment. Graduates will bring this cross-cultural competence into the workplace, allowing them to be more productive, efficient, and comfortable in their surroundings and enabling them to more effectively advocate for their clients.[21]

IV. RACE-CONSCIOUS ADMISSIONS PROGRAMS ARE EFFECTIVE IN ACHIEVING STUDENT DIVERSITY, AND RACE-NEUTRAL ALTERNATIVES SUCH AS SOCIOECONOMIC STATUS AND PERCENTAGE PLAN PROGRAMS PRODUCE INADEQAUTE RESULTS.

The University of Michigan Law School's race-conscious admissions program is narrowly tailored to achieve a diverse student body, and there are no race-neutral alternatives that will achieve the same result. Although the consideration of race is not the only manner in which diverse perspectives can be obtained, using race ensures the greatest variety of

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[21] "Our society—indeed our world—is and will continue to be multi-racial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can make a profound and direct contribution to the achievement of this end." *See* Bowen Report, *supra* note 10, at 1.

backgrounds and viewpoints, which ultimately improves the educational atmosphere in universities.[22] The University of Michigan Law School has implemented race-neutral alternatives in the past, but these practices failed to produce a racially diverse student body as envisioned by the University. Without a race-conscious admissions program in place at the University of Michigan Law School, its student body will lack the diversity that is needed to create a robust exchange of ideas in the law school classroom.

Race-neutral alternatives, such as the consideration of socioeconomic status or percentage plan programs, are not as successful as race-conscious admissions programs in ensuring racial diversity in universities. If the University of Michigan Law School were to rely on socioeconomic status without considering race, the number of minority students admitted under such a program would not create a racially diverse class.[23] Similarly,

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[22] *See* Bollinger, *supra*, at 540-41 ("[E]thnic and racial diversity within a university setting is absolutely essential to the accomplishment of a university's missions, and is at the very core of what a university does...."); *see also Grutter*, 288 F.3d at 739 ("The evidence defendants submitted...demonstrated that the educational atmosphere at the law school is improved by the presence of students who represent the greatest possible variety of backgrounds and viewpoints.") (citing *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001)); Bowen Report, *supra* note 10 (noting that evidence demonstrates that race-neutral alternatives for achieving a diverse student body, such as the consideration of socioeconomic status, are not "likely to be as effective as race-sensitive admissions in enrolling an academically well prepared and diverse student body").

[23] *See* Bowen & Bok, *supra* note 8, at 51:

percentage programs like those supported by President Bush are not only ineffective in achieving racial diversity at the undergraduate level,[24] but also inapplicable at the professional and graduate levels. Furthermore, the success of the percentage plans depends on the continued segregation of high schools, which is contrary to the mandate of *Brown*. Under percentage plans, a diverse student body within universities cannot be attained unless there are high schools that remain almost exclusively African American or Hispanic American to guarantee that minorities rank within the established percentile. Race-neutral solutions are ineffective methods for the University of Michigan Law School to achieve the compelling interest of a diverse student body; thus the University is left with

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> While it is true that [African American and Hispanic] students are much more likely than white students to come from families of low socioeconomic status, there are almost six times as many white students as [African American and Hispanic] students who come from low-SES families and have test scores that are above the threshold for gaining admission to an academically selective college or university. Even if it were financially possible to admit substantially more low-income applicants, the number of minority students would be affected only marginally.

[24] Despite their race neutrality, such plans do not consider the strength of the high school but instead take students from weaker schools who lack preparation to excel academically. Such programs "fall short of addressing the inadequate preparation of students at primary and secondary levels" and are setting minority students up for educational failure. *See* National Association for College Admission and Counseling Issue Paper: Affirmative Action in College Admission (Summer 2001), *available at* http://www.nacac.com/downloads/affirmativeactionissuepaper.pdf.

only one viable alternative — using race as one of many factors considered in its admissions process.

Because race plays an integral role in shaping the law and continues to permeate every aspect of our society, the University of Michigan Law School's interest in obtaining a diverse student body is sufficiently compelling to justify the consideration of race. As noted by Lee Bollinger, "where [else] will these different paths of society come into contact so they can learn from one another ... if not in our system of public and private higher education? Race still matters." Bollinger, *supra*, at 539.

If law schools are prohibited from considering race in their admissions programs, minority enrollment will significantly decrease, thereby deteriorating the core values of racial integration underlying *Brown*. Consequently, students will be deprived of a culturally rich pedagogical environment that will allow them to confront legal issues that are critical to our multiracial society.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

INTERESTED PARTIES*

***Roberta Herbert, Records Specialist, certifies that the following undersigned students are currently registered at Howard University School of Law.**

Abdur-Rahman, Isa
Abrams, Lisa M.
Adekeye, Akinbowale O.
Ainman, Rachel
Alexander, Kebran
Allen, Shay
Altifois, Leander
Andrews, Diara
Anyan, Samuel A.
Asfaha, Semira
Ashby, Hazeen
Aziz, Abdul Razak
Baarez, Nebiat
Bannister, Adonna J
Bawa, Jasbir
Bea, Stefany L.
Benjamin, Chaka
Bennett-Brynt, Melissa
Best, Dalila
Best, David
Bigby, Marsden
Black, Dion
Black, Alesia
Blake, Erica
Blake, Hanna L.
Blaeuer, Maria E.
Bonner, Michael V. F.
Boyd, Nashiba F.
Bradley, Erica
Braithwaite, Joel
Brooks, Ayana
Brooks, Nisha N.
Brown, Wanda D.
Brown, Turkessa L.
Browne, Hillary
Brumskine, Charles
Burchell, Kelly
Burguillo, Malibea
Burton, Cassandra
Byars, Joanne
Cain, Brandi
Caldwell, Raquel
Camacho, Karina
Campbell, Omolola
Campbell, Micala
Campbell, Rwanda
Cantave, Gabrielle
Carraway, Rasheeda
Carter, Brandi
Castillo, Luis
Cauley, Clay
Chaney, Vernida

Chapman, Kenya
Chauhan, Reetu
Christophe, Cliff
Christian, Morenike
Clarke, Kwasi
Clunie, David G.
Cole, Sharon
Coleman, William
Coleman, Charles
Coleman, Kenyon C.
Coley, Simone
Collins, David A.
Conley, Danielle
Cook, Andrea
Crenshaw, Adrienne
Crowder, Terrica
Cummings, Louise
Cureton, Donald
Daniel, Jennifer
Daniels, Sherell D
Dash, Kwesi Ako
Davis, Kendrah L.
Davis, Ben
Denman, Darrian
Deskins, Marska
Dillard David
Dinkins, Brandee A.
Dixon, Ayesha J.
Doggett, Kai
Dubuche, Christian
Dyton-White, Rayna
Early, Delmont
Evans, Carlos
Evans, Geordana M.
Exceus, Juderns
Fagan, Trevor
Fanfair, Jermaine
Fleming, Stephanie
Flythe, Michelle
Ford, Yaifa Oni
Foxx, Marcus T.
Francis, Genelle
Francis, Ruth
Frazier, April
Fresh, C.M.
Fryson, Nicole
Gadsden, Gibran
Gant, Asina
Gasper, Joseph T.
Gee, Kimberlee
Gibson, Richard
Gillissen, Jeremy
Gilmore, Sharon
Goff, Norvel
Gough, Kathleen S.
Gowens, Alyssa
Grant, Jason
Graves, Carmiece
Green, Michael J.
Greene, Everett
Greene, Annette
Gross, Melanie K.

Gulstone, Ronan
Handi, Alina
Hall, Margaux
Hall, Alexis
Hall, Preston R.
Hamilton, A., Ph.D.,
Hankerson, Corey
Hardy, Chanelle
Hare, Jennifer
Harley, Heturah Denise
Harris, Natasha
Harris, Michelle R.
Hedman, Alexis E.
Henderson, Da'Net J.
Henley, Kevin
Henry, Jamar
Hicks, Minisha C.
Hinish, Lorn
Holland, Angela
Holingsworth, Scott
Holloman, Roderick J.
Holmes, Matthew
Hortman, LaMar
Horton, Lenore
Howard, Millard
Hussein, Yitzhak
Jackson, Greg
Jean Baptiste, Diane
Jenkins, Nicole M.
John, Nicolette
Johnson, Marcy
Johnson, Margaret
Johnson, Jeanine
Johnson, Devin
Johnson, Andrea E.
Johnson, Andre N.
Jones, Brandy
Jones, Tamika
Jones, Karen L.
Jones, Ellaretha
Jones, Jana Anita
Jones-Francis, Nadine
Jones-Wright, Genevieve
Jones, Rashida, S.
Jordan, Ponzo
Jordan, Tracy
Joseph, Omar
Kamara, Kamal
Kasarabada, Ramesh
Kendrick, Lindsay N.
Kessler, David
King, Sojourner
King, Patrick
Messiah, Lucericia
Kirwan, D. Antoinette
Konrad, Robin
Kubrom, Samuel
Kyle, James
Langford, Sarah E.
Layne, Janelle
Leathers, Marshall
Ledet, Lenus

Leeks, Janelle
Lewis, Fasha
Lewis, Nicole
Llewellyn, Stacy Ann N.
Lloyd, Otisha
Long, Rhonda
Lynch, Cory J.
Mack, Shona
Maddox, Jason
Manns, Ryan
Manson, John
Marshall, Amina
Martin, Christopher M.
Martin, Khaalis
Mason, Azura
Mavunda, Rita
McCallum, Howard
McCaskill, William
McCollum, James
McCormick, Corlie
McDonald, Nia
McEachin, Oujil
Mckee, Sharmil
Mckenzie, Terri
Mclaren, Tamara
McNeil, Arthur L.
Mehta, Tarun
Milfort, Job P.
Mirchandani, Reshma
Mitchell, Sabrina
Montgomery, Jacquelene
Montgomery, Addrana R.
Moody, Delanissa
Morgan, Caesar
Morgan, Tamara
Morris, Ernest
Morris, D'Asia M.
Morrow, Conley
Moss, Yvonne
Muhammad, Ifraj
Muhammad, Jamal
Murrain, Jelani
Murray, Tiffany
Muse, Kristopher
Ndiaye, Carina
Neal, Denita
Needham II, C. Anthony
Nelson, Veronica
Nguyen, Tram
Nichols, Kenneth J.
Nnabuithe, Obiageli
Nwabuzor, Nkechinyem
Oduah, Chinwe
Okeke, Ben
Okoroegbe, Christopher
Oliver, Aisha
Onyejekwe, Sylvia
Osborne, Sara
Otum, Peggy
Owens, W. Lanelle
Palmer, Kahlill

Parker, Ara
Parker, Kimberly
Partee, Ayana
Patcha, Kevin
Patel, Devanshi
Patterson, Brandon
Pettie, Jason
Phillips, Willie
Pierre-louis, Barbara
Pitre, Marques
Pittman, James
Plummer, Andrene
Porter, Marwan
Prater, Ulani D.
Price, Albert
Quinn, Teri Janine
Quiring, Stephanie
Ramson, Angela
Raja, Zahid
Rey, Marquex
Reyes, Alejandro
Richards, John C.
Roberts, Rhina
Robinson, Danielle
Robinson, Eric
Robinson, Kito B.
Robinson, Tiffany
Romond, Joseph A.
Roshell, Alicia A.
Rluse, Patrice
Rouzan, Don
Royer, Dara
Samuel, Marlene
Santagati, Anthony
Saunders, John F.
Scott, Dana
Shasanmi, John
Shaw, La' Keabian
Shaw, Lani P.
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AMICUS CURIAE

BRIEF

No. 02-241

FILED
FEB 2003

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE SCHOOL OF LAW OF THE UNIVERSITY OF NORTH CAROLINA SUPPORTING RESPONDENTS

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-241

BARBARA GRUTTER,
Petitioner,
v.

LEE BOLLINGER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE SCHOOL OF LAW OF THE UNIVERSITY OF NORTH CAROLINA SUPPORTING RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

The University of North Carolina is the oldest public university in the nation. Authorized by North Carolina's Constitution of 1776, chartered in 1789, the University opened its doors to students in 1795.[2] Ever since its first

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[1] Letters from the parties, consenting generally to the filing of brief by *amici curiae*, are on file with the Court. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party. No entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

[2] Albert Coates, *The Story of the Law School at the University of North Carolina*, 47 N.C. L. Rev. 1, 5, 11-13 (1968); *see generally* William S. Powell, *The First State University* 4-10 (3d ed. 1992).

professor of law was appointed in 1845, the University's School of Law has been a preeminent training ground not only for generations of lawyers who have served the State and region but for much of the State's leadership class—its governors, judges, legislators, business and public leaders.[3]

Despite its central role in nurturing North Carolina's youth and molding its leadership structure, during the first 106 years after it began offering legal education, the University of North Carolina restricted, by race, both admission to its halls of learning and the many lifelong privileges afforded to its graduates.[4] No matter how qualified by talent and preparation, black and Native American applicants were systematically denied the professional opportunities and the manifold personal associations the University afforded to whites.[5] Only with the success of a

[3] William K. Boyd, 2 *History of North Carolina: The Federal Period 1783-1860*, at 362-63 (1919) (noting the influence of University graduates on the public life of the State); Hugh Talmage Lefler & Albert Ray Newsome, *North Carolina: The History of a Southern State* 406-07 (3d ed. 1973) (same).

[4] In rejecting a challenge brought against the University's all-white policies in 1950, a federal district court observed that "[s]egregation is provided for under the constitution of North Carolina in relation to its public schools." *Epps v. Carmichael*, 93 F. Supp. 327, 331 (M.D.N.C. 1950), *rev'd sub nom. McKissick v. Carmichael*, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951). The district court cited N.C. Const. art. 9, §2, which then read: "And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race." This provision, a post-Reconstruction amendment in 1876 to the North Carolina Constitution of 1868, was not overruled until *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See* John V. Orth, *The North Carolina State Constitution* 145 (1993).

[5] For example, Pauli Murray, a young black woman from Durham, North Carolina, who had graduated from Hunter College in New York, who eventually received her law degree from Howard, her LL.M. from Berkeley, her J.S.D. from Yale—an extraordinary woman who served as a civil rights lawyer, an author, a college professor, a deputy attorney general in California, a friend of Eleanor Roosevelt and a co-counsel with then-Professor Ruth Bader Ginsburg in the seminal case of *Reed v.*

federal lawsuit brought in 1950 by Floyd B. McKissick and others—with the legal support of Thurgood Marshall, Robert Carter, and the NAACP Legal Defense & Educational Fund, Inc.—did qualified non-white applicants finally break through the University's color barrier,[6] allowing African Americans, Native Americans, and others—some 26 percent of the State's citizens and taxpayers[7]—their first access to this center for legal and leadership training.

The University and its School of Law have since reached out to offer higher education and legal training to qualified young men and women—rich and poor, black and white, Native American, Hispanic, and Asian American—drawn from all across the State, from small towns in the valleys of the Great Smokies and Blue Ridge Mountains to the prosperous cities of the State's Piedmont region, to the market towns and hamlets of the Coastal Plain plantation country, to the remote villages of the Outer Banks.[8]

Public universities in the United States embrace a special mission, one significantly different from that of the nation's private colleges and universities. North Carolina's School of Law necessarily and proudly offers higher education to young people of promise and talent from every spectrum of the State's diverse citizenry. To them it provides crucial training and a subsequent web of acquaintances and mentors who will offer lifelong assistance as they mature

Reed, 404 U.S. 71, 72 (1971)—was denied admission to the University of North Carolina School of Law in 1938 solely because of her race. Pauli Murray, *Song in a Weary Throat: An American Pilgrimage* 114-23 (1987).

[6] *See McKissick v. Carmichael*, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951) (ordering admission of Floyd McKissick and other African American students to the University of North Carolina School of Law). *See generally* Charles E. Daye, *African-American and Other Minority Students and Alumni*, 73 N.C. L. Rev. 675, 678-686 (1995).

[7] *See Epps*, 93 F. Supp. at 330 (noting that the parties stipulated that whites comprised only 74% of the State's population in 1950).

[8] *See* Rebecca Morphis, *The 18 Percent Rule*, Carolina Alumni Review, Mar./Apr. 2002, at 20, 27.

into the future leaders of this State and region.[9] No institution in our society works more effectively than higher education to fulfill the American promise of upward mobility.

The benefits of this public university mission do not flow exclusively to the individual students who come to Chapel Hill. The University and its School of Law are charged to call forth the next generation of State leadership—to train those who will sit as our judges, people our legislative assemblies, serve as corporate officers and non-profit directors, advise our school boards, and bring legal services to the poor throughout the State of North Carolina. That leadership cadre is crucial for the collective future of the State. *To nurture the future leaders of our State and region, then, is the most compelling end to which the School of Law could dedicate itself.*

We come before the Court today convinced that this crucial mission stands at risk in *Grutter*. From our State's decades of bitter experience, from our hard-won

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[9] The stated mission of the UNC School of Law is threefold:

> "[T]o educate future practitioners and leaders of the bench and bar; to accomplish an ambitious research agenda; and to serve the legal profession, the state of North Carolina, and the nation through significant involvement in law reform and similar activities."

School of Law, The University of North Carolina at Chapel Hill, *2002-2003 Record* 4 (2002).

The public mission statement of the University of North Carolina at Chapel Hill begins:

> The University of North Carolina at Chapel Hill has been built by the people of the State and has existed for two centuries as the nation's first state university. Through its excellent undergraduate programs, it has provided higher education to ten generations of students, many of whom have become leaders of the state and the nation.

See University of North Carolina at Chapel Hill, *University Mission*, *at* http://www.unc.edu/about/mission.html (last visited Jan. 28, 2003).

commitment to racial justice, we know that a careful effort to build racially diverse student bodies in our public universities constitutes *the single most effective—indeed, an indispensable—means* of assuring that all the people of our State will be participants in its collective future, avoiding the reemergence of a regional apartheid, and contributing to our general State need for well-trained government and business leadership. The School of Law has used race-conscious methods—carefully and sparingly, to be sure, but regularly—ever since this Court in 1978 gave them its approval in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978) (Powell, J.); *id.* at 362-63 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

We also know that race-conscious methods succeed. The careers of UNC's first generation of non-white law graduates demonstrate that success daily. African American and Native American graduates of the School of Law have provided the State with: its first black chief justice, its first black federal district judge, its first black associate justices, its first Native American state judge, as well as leading private practitioners, leaders of state legal services and other public interest activities, corporate directors and prominent business men and women.[10]

We are compelled to inform you that the gains of the past forty years—precious not only to non-white citizens, but to the collective future of all North Carolinians—will be compromised, their benefits substantially curtailed, if this Court accepts the petitioner's invitation to foreclose all consideration of race in law school admissions decisions. Well aware of tragic lessons that our regional history has taught us, summoning all the passion we can muster, we inform the Court, as conscientious educators and regional

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[10] *See* Daye, *supra* note 6, at 681-703 (recounting the careers of the African American, Native American, and Latino graduates of the School of Law prior to the mid-1990s).

leaders, that any abrupt end to race-conscious admissions threatens a return of *de facto* racial segregation to many public institutions of higher education throughout this State and region. Any such resegregation, even if *de facto* rather than *de jure*, would be absolutely devastating to our State—and, we believe, to our national future.

That disturbing prospect, nothing less, constitutes our interest in this case.

SUMMARY OF ARGUMENT

Public universities and their law schools share a special educational mission, for their citizens have charged them with nurturing the future leadership of their states and regions. *Amicus* shares Dr. Martin Luther King's long-awaited vision of a nation in which children "will not be judged by the color of their skin but by [the] content of their character."[11] Yet regrettably, in the year 2003, we have not reached that goal. North Carolina's electoral strategies and political appointments often turn on issues of race. All too frequently, financial institutions, auto sales personnel, and restaurants vary their products and services by race. Doctors and hospitals offer lifesaving treatments differently, dependent upon the race of their patients. Prosecutors and defense counsel select their juries, shape their arguments, and launch their jury pleas with race in mind.

To combat these socially destructive tendencies, *amicus* finds it indispensable to draw future leadership from among the State's and region's racial and ethnic communities—from white, African American, Native American, Hispanic, and Asian American applicants. It is essential that future State leadership possess collective trust sufficient to overcome old barriers that have divided our

[11] Martin Luther King, *I Have a Dream, in A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 217, 219 (James M. Washington ed., 1986).

citizens, subordinating some while favoring others. The State of North Carolina knows, in short, that its future statewide leadership cohort *should be*, and inevitably *will be*, racially and ethnically diverse. The principal challenge is to prepare these nascent leaders for their future responsibilities. The School of Law is determined to provide them the finest education we can offer.

Our mission creates a compelling interest in race-conscious student admissions policies, an interest that has not received full consideration in prior cases. For, in addition to selecting students who will enrich daily in-class learning by their diverse backgrounds, the University of North Carolina and its School of Law, like other public universities, bear the special burden to prepare the State's future leaders for the diverse needs of the region they will soon serve.

No lesser means than race-conscious admissions can fully accomplish these ends. The United States suggests that the Equal Protection Clause demands the use of race-neutral means instead.[12] This Court has never so held. To be sure, the Court has insisted that when states employ racial classifications *for remedial purposes*, those remedies must stretch no farther than necessary, and that race-neutral means be employed when possible. Yet the constitutional propriety of a State's chosen means will necessarily depend, even under strict scrutiny, on the nature of the State's compelling end.

Here, the School of Law's end necessarily looks toward the State's future, not merely its present or its past, for it is acting to foster its future leadership cohort, recognizing that in the 21st century, it is democratically imperative—and demographically inevitable—that future leaders be drawn from the different racial and ethnic populations that make up our state. To acknowledge this goal

[12] Brief for the United States as Amicus Curiae at 22-23, Grutter v. Bollinger (No. 02-241).

and to set about its achievement honestly, through the selection of students from diverse racial backgrounds, is not only constitutionally permissible, but also infinitely preferable to the subterfuge the United States endorses—to reach racial diversity by following a roundabout path of non-racial means.

The United States suggests that the recent experiences of Texas, Florida, and California demonstrate that race-neutral admission methods can equally avail to reach these goals.[13] The carefully chosen admissions practices, refined by college and university administrators during the past generation, refute that assumption. Indeed, only when faced with judicial or legislative decrees have unwilling educational leaders resorted to awkward race-neutral alternatives, abandoning with reluctance the more straightforward affirmative action policies long approved in *Bakke* and faithfully followed by university officials ever since. Moreover, despite the United States' assurances, minority student enrollments have declined in the flagship educational institutions of Florida, Texas, and California because of these race-neutral means. Yet if history is a guide, it will be from these flagship institutions, now once again disproportionately white, that the state leadership of 2025 will emerge.

The United States offers a final dollop of reassurance with its plea for reversal, insisting that *Grutter* can be decided on the basis of well-settled constitutional principles that would "break no new ground."[14] This consolation is misguided as a statement of constitutional law and myopic as a prediction of real-world consequences. This Court surely recognizes that if it overturns the *Grutter* decision below and ends race-conscious admissions practices, it will turn the lodestar rule in *Bakke* on its head— a rule that has guided public and private college admissions principles and

[13] *Id.* at 17-22.
[14] *Id.* at 12, 37.

practices for almost thirty years. Moreover, the good faith efforts of a full generation of public university admissions officers—who have acted year in and year out in every state, with the full sanction of governors, legislatures, and university chancellors to broaden access to public higher education—would be irreparably injured by an adverse ruling from this Court.

Grutter will inescapably determine the future student complexion of our public and private universities, and with it, the future of American leadership. The only future worthy of our deepest hopes is one that embraces young Americans from every racial and ethnic background. Public university officials have recognized this truth for a generation. The Court should resist the present call to displace these good faith educational judgments with a rigid and inflexible judicial decree.

ARGUMENT

I

PUBLIC UNIVERSITIES HAVE A SPECIAL MISSION TO PREPARE THE FUTURE LEADERS OF THEIR RESPECTIVE STATES

In recent years, the Court has strongly suggested that every choice by government to employ a racial classification "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235-36 (1995).[15] This principle of strict judicial scrutiny is not, however,

[15] *But see Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473-74 (1982) (assuming that no constitutional principle prevents public school boards from voluntarily employing race-conscious policies when assigning students to public elementary and secondary schools).

invariably "fatal in fact," as the Court has also reminded us, *id.* at 237, for some state goals are sufficiently compelling to justify careful use of racial classifications:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it . . . .When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

Id; *see also Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) (noting "the ample authority legislatures possess to combat racial injustice"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (observing that strict scrutiny "assur[es] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool").

Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), validates one permissible use of race-conscious means: race may serve as one factor in university admissions practices aimed at the "attainment of a diverse student body." *Id.* at 311-12 (Powell, J.). Justice Powell reasoned that First Amendment considerations justify race-conscious practices, since racially diverse student communities promote an "atmosphere of 'speculation, experiment and creation.'" *Id.* at 312-13.

We as *amicus*, drawing upon over three decades of experience as law teachers, scholars, and administrators,[16]

[16] Counsel include the present Dean of the UNC School of Law, Gene R. Nichol, who previously served as dean of the University of Colorado

know and confirm that racially diverse law schools deepen legal study and enrich student understanding of the law.[17] Joining thousands of other academic and administrative officials, then,[18] we fully endorse both the empirical assumptions that underlay Justice Powell's opinion in *Bakke* as well as its legal conclusion, which affirmed the careful use of race as "a plus factor" in university admissions. *Id.* at 317. Indeed, Justice Powell's conclusions echoed the Court's earlier, unanimous observation in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), recognizing the crucial value of a racially diverse legal education.

Yet we here argue for another compelling interest—one that is not solely dependent upon the richness that racial diversity brings to the classroom. State universities exist, and state taxpayers have long supported them generously, not simply because they offer educational enrichment to individual students. Rather, these special institutions

School of Law; Julius L. Chambers, former Chancellor of North Carolina Central University; Charles E. Daye, former Dean of North Carolina Central University School of Law, who has previously served as President of the Law School Admission Council; and John Charles Boger, former Associate Dean of the UNC School of Law.

[17] *See* Richard A. White, *Preliminary Report: Law School Faculty Views on Diversity in the Classroom and the Law School Community* (May 2000) (reporting law school professors' opinions about the positive effects of racial diversity on classroom experience); Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity From Affirmative Action in the Law School Admissions Process*, 77 N.C. L. Rev. 1479, 1488 (1999) (reporting on the difference that a lack of diversity makes in the law school classroom experience); *see also* Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in Diversity Challenged: Evidence on the Impact of Affirmative Action* 161 (Gary Orfield & Michael Kurlaender eds., 2001) (reporting that over 90% of the students surveyed at the Harvard and Michigan Law Schools felt diversity had a positive impact on their educational experience, and noting that such a substantial majority is "very rare" in public opinion research).

[18] Brief of *Amicus Curiae* Association of American Law Schools at 10-12, Grutter v. Bollinger (No. 02-241).

undertake a profoundly important societal duty: to produce the next generation of state and regional leadership.

North Carolina must have doctors and lawyers, judges and dentists, social workers and public health officers, city planners, teachers, pharmacists, and many other trained professionals in every single corner of this sprawling state, in every single generation. Since 1795, the University of North Carolina has endeavored to fill these needs. With a similar mission, the School of Law has labored since 1845 to people the chambers of our county courthouses, the halls of our General Assembly, the Governor's mansion, and every public and private law office where citizens who seek legal counsel can consult with well-trained professionals.[19] Like other public universities, the University of North Carolina has labored for more than two centuries to fashion leadership for each emerging generation.[20]

Earlier in this brief, we acknowledged an original sin of exclusion: the University deliberately and grievously omitted from its mission, for a full century after Lincoln's Emancipation Proclamation and despite the adoption of the

[19] Living alumni of the University of North Carolina include some 472 who self-report that they are chief executive officers of companies in North Carolina, 422 who are executive directors, 3,402 who are presidents of companies or their organizations, and 3,688 who are attorneys/lawyers practicing in North Carolina. University of North Carolina at Chapel Hill, Alumni Database, 2003. Since only 8,950 attorneys were registered to practice law in North Carolina in 2000, the School of Law has clearly produced a very substantial fraction of the State's current bar. Bureau of Labor Statistics, U.S. Dep't of Labor, *2000 State Occupational Employment and Wage Estimates: North Carolina*, http://www.bls.gov/oes/2000/oes_nc.htm#b23-0000 (last visited, Jan. 28, 2003).

[20] Historian James Leloudis has noted that "[b]y the 1860s, the [University of North Carolina] had produced a president and vice president of the United States, twenty governors, eight senators, forty-one members of the House of Representatives, and innumerable judges, state legislators, and justices of the peace." James L. Leloudis, *Schooling the New South: Pedagogy, Self, and Society in North Carolina, 1880-1920*, at 50 (1996).

post-Civil War Amendments, large and important segments of the State's citizenry. African Americans and Native Americans were shut out, not only from all that the University and its School of Law offered,[21] but also from the many important public roles that University graduates assumed thereafter.[22]

The University has in recent decades, by word and deed, strongly repudiated its former exclusivity. Just as we now select students from every far corner of the state, so likewise have we determined to ensure that students of all racial and ethnic backgrounds will become part of the next generation of this State's leadership.

To do so is a compelling necessity. The demographic transformation is already quite obvious, both for the State and the nation. African Americans, who constituted only

[21] *See McKissick*, 187 F.2d at 950-51; *see also Adams v. Richardson*, 356 F. Supp. 92, 94 (D.D.C. 1973) (reciting a 1969 conclusion rendered by the United States Department of Health, Education, and Welfare, that the State of North Carolina had been operating a racially segregated system of higher education in violation of Title VI of the Civil Rights Act of 1964, and noting that the State, as late as 1973, had "totally ignored HEW's requests . . . and have never submitted a desegregation plan"), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973); *see generally* Walter H. Bennett, Jr. & Judith Welch Wegner, *Lawyers Talking: UNC Law Graduates and Their Service to the State*, 73 N.C. L. Rev. 846, 862 (1995) (recounting the recollections of Superior Court Judge Dexter Brooks, the first Native American to graduate from the UNC School of Law in 1976, who recalled as a child "a very prominent Lumbee Indian, who grew up in [his community], served in the Second World War, . . . received a bachelor's degree" but upon seeking law school admission "was told that Carolina did not accept Native Americans").

[22] *See generally* Gunnar Myrdal, *An American Dilemma: The Negro Problem & Modern Democracy* 304-07 (20th anniv. ed., 1962) (observing that while lower wage African American workers nationwide could enter much of the broader, white-dominated labor market, though excluded from many trades and given the lowest jobs in others, "most Negro businessmen, professionals, and Negro white collar workers are either dependent on the segregated Negro community for their market or they serve in public institutions—like schools and hospitals—set up exclusively for the use of Negroes").

11.8% of the national population in 1980, are projected to increase to 14.7% of the population by 2050. Hispanics are expected to increase from 6.4% to 24.3% of the population during the same period. Asian Americans will grow from 1.6% to 9.3% of the population, while Native Americans will grow from 0.6% to 1.1%.[23]

North Carolina's population is already experiencing the impact of these profound changes. African Americans have long constituted more than 20% of the State's population, reaching 22% by 1997. Moreover, while Hispanics comprised only 2% of the State's population in 1997, their numbers are rising far faster than those of any other group in North Carolina—an increase of more than 163% between 1980 and 1997.[24]

African Americans and Hispanics have begun to move into positions of public leadership commensurate with their growing numbers. Black elected officials nationwide more than quintupled between 1970 and 1999, from 1,469 to 8,896,[25] while Hispanic elected public officials increased from 3,147 to 5,205 between 1985 and 2000.[26] Fully 19% of all state and local government employees were African American by 1999, while 7.8% were Hispanic.[27] Meanwhile, the percentage of African American lawyers has climbed from 2.6% of the national bar in 1983 to 5.4% in 2000, while

[23] Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 2001*, at 13, tbl. 10 (121st ed., 2001).

[24] James H. Johnson, Jr. et al., *A Profile of Hispanic Newcomers to North Carolina*, Popular Gov't, Fall 1999, at 2, 4, tbl. 1. Indeed, the 2002 Census reports that Hispanic North Carolinians now comprise 4.7 % of the State's population. Bureau of the Census, *supra* note 23, at 25, tbl. 23.

[25] Bureau of the Census, *supra* note 23, at 250, tbl. 399.

[26] *Id.* at 250, tbl. 400.

[27] *Id.* at 295, tbl. 452 (providing state and local totals by race and ethnicity).

the percentage of Hispanic lawyers has grown from 0.9% to 3.9%.[28]

We could offer additional data, but the basic point is clear: non-whites are already moving into leadership positions throughout North Carolina and the nation as a whole. It is public universities, including the University of North Carolina, that bear a special responsibility to train them. For example, as the Law School Admission Council reported in 2001, 60.3% of the law graduates from the University of North Carolina remained in the state, while only 12.1% of those from nearby Duke University, which has a wonderful private law school, did so. The University of North Carolina sent 14.4% of its graduates into government jobs, and 4.8% into public interest jobs; Duke's comparable statistics were 3.0 % and 0.5%.[29] These numbers do not diminish Duke's important service to the national legal profession, of course. What they do reveal is how crucial to the State's future is the University of North Carolina's unique public mission to educate students drawn from across the State, and from all racial and ethnic backgrounds.

Despite, or perhaps because of, North Carolina's changing demographic realities, racial discrimination remains a serious problem, as the Court well knows. The State's voting patterns and political struggles display the residual effects of racial discrimination and prejudice. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 39-40 (1986) (reciting the district court's finding that "historic discrimination in education, housing, employment, and health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites," and that "this lower status both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and elect representatives of their

[28] *Id.* at 380, tbl. 593.

[29] American Bar Ass'n & Law School Admissions Council, *ABA-LSAC Official Guide to ABA-Approved Law Schools* 51 (2003 ed.).

choice," even as "white candidates in North Carolina have encouraged voting along color lines by appealing to racial prejudice"); *see also Easley v. Cromartie*, 532 U.S. 234, 239, 245 (2001) (noting the persistence of racially identifiable voting patterns, by political party, in North Carolina).

Serious disparities by race continue in North Carolina and the South, and they call for thoughtful State leadership in a wide variety of public and private contexts. For example, the Court has found that white agents who worked for North Carolina's Agricultural Extension Service received systematically higher levels of pay than similarly qualified black agents, long after formal segregation of the program had ended and Title VII of the Civil Rights Act of 1964 had been enacted. *Bazemore v. Friday*, 478 U.S. 385, 394-95 (1986) (per curiam). There has been continuing evidence of private discrimination against African Americans who seek mortgage finance assistance in the South and elsewhere.[30] Non-whites often receive less adequate medical care from doctors and hospitals in North Carolina and elsewhere.[31]

We adduce these remnants of our racially polarized past to stress the interest of our State in overcoming racial

[30] *See* William Dedman, *The Color of Money* (pts. 1-4), Atlanta J.-Const., May 1-4, 1988, at A1. (documenting racial disparities by Georgia banks in credit and lending policies involving African American customers); George Galster, *Use of Testers in Investigating Discrimination in Mortgage Lending and Insurance, in Clear and Convincing Evidence: Measurement of Discrimination in America* 287-334 (Michael Fix & Raymond J. Struyk, eds., 1993) (reviewing various studies, using "testers," that found widespread discrimination against African American consumers who sought loans or credit from financial institutions).

[31] Brian D. Smedley, *Unequal Treatment: Confronting Racial & Ethnic Disparities in Health Care* 2-3, 44 (Institute of Medicine, National Academies, 2002) (reporting upon a "large body of published research [which] reveals that racial and ethnic minorities experience a lower quality of health services, and are less likely to receive even routine medical procedures than are white Americans," and specifically noting one study of racial differences in cardiac care in North Carolina teaching hospitals).

divisions and to emphasize how much work remains to be done in the year 2003. That work must be led by State and local officials from the bench and bar, from legislative committee rooms, from district attorneys offices, from a variety of executive agencies, all of whom must earn the trust of the State's citizens and call upon the better angels of our citizens' natures. To win that trust and be effective in their crucial work, those leaders, we are deeply persuaded, *must include* citizens from the State's various racial and ethnic communities.

II.

ALLOWING LAW SCHOOLS TO CONSIDER RACE AS ONE FACTOR IN SELECTING STUDENTS HAS PROVEN THE LEAST RESTRICTIVE AND FAIREST MEANS OF ASSURING THAT STATES CAN PROVIDE HIGHER EDUCATION TO THEIR MOST PROMISING FUTURE LEADERS

The University has traditionally admitted students with all of North Carolina's geographical regions firmly in mind. The University and the State could not afford to restrict its educational opportunities to the thousands of bright young men and women who annually pour out of the high-tech communities of our Piedmont high schools while leaving Appalachia or our Coastal Plains without their needed share of doctors, lawyers, and teachers. Of course students' grades and SAT scores are appropriately considered in making admissions decisions, but they alone cannot be determinative, lest we penalize the future leaders of our less prosperous regions which are often served by poorly funded public elementary and high schools.[32]

[32] *See generally*, Public School Forum of North Carolina, *2001 North Carolina Local School Finance Study* 1 (Dec. 2001) (documenting a

North Carolina's demand for future leadership similarly requires that the School of Law be free to take some account of race as it makes its admissions decisions. Of course, any need for race-conscious admission practices will diminish once African American and Hispanic students in North Carolina regularly perform at levels equivalent to those of white students on standardized tests (a goal toward which public elementary and secondary schools are presently striving). At present, regrettably, they do not.[33] While many black and Hispanic students can offer academic credentials fully as dazzling as those of the ablest white students, on average, white law school applicants post higher scores on standardized tests than do African American, Native American, or Hispanic applicants. This "achievement gap" has been long documented, especially on standardized tests such as the SATs and LSATs, upon which this University, like many others, relies when making its admission decisions.[34] Explanations for the gap remain unclear, though

substantial spending gap between the state's wealthiest and poorest counties that has increased since 1987).

[33] The North Carolina Comm'n on Raising Achievement and Closing Gaps, *First Report to the State Board of Education* 4 (Dec. 2001) (the "Bridges Report") (reporting that "[w]hen poverty is factored out, middle class white students [in North Carolina] still score significantly higher than middle class African American students" on North Carolina's statewide standardized tests of academic performance).

[34] Linda F. Wightman, Law School Admission Council, *Research Report 99-05, Beyond FYA: Analysis of the Utility of LSAT Scores and UGPA for Predicting Academic Success in Law School* 8-14 (2000) (reporting on a longitudinal study of 142 law schools, demonstrating that, on average, black students consistently score lower than white students on the LSAT); Linda F. Wightman & David G. Muller, Law School Admission Council, *Research Report 90-03, An Analysis of Differential Validity and Differential Prediction for Black, Mexican American, Hispanic, and White Law School Students* 7 (1990) (concluding that minority students scored lower than non-minority students on the LSAT, based on analysis of LSAT results for 1986-1988); *see generally The Black-White Test Score Gap* (Christopher Jencks & Meredith Phillips eds., 1998) (examining many aspects of this phenomenon, including its

there is some evidence that African Americans continue to face discrimination in receiving quality education even within their local school districts.[35]

The University of North Carolina and its School of Law do not, of course, court academic failure. We admit only students, of whatever race, who are fully qualified to succeed in higher education. We have consistently found that qualified non-white students not only graduate at rates equivalent to their white peers, but also go on to deliver precisely the kind of service as lawyers that fulfills our principal mission as a public university.[36] Former Princeton

extent, the historic changes in the gap, and possible reasons for a recent narrowing of the gap).

[35] *See, e.g.*, Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 Am. Educ. Research J. 215, 232 & tbl. 2 (2001) (reporting on high levels of racial imbalance in Charlotte-Mecklenburg's twelfth grade English, biology, and United States history classes, and finding that even those black students who scored in the top ten percentile on national standardized tests were disproportionately tracked into "regular" or lower academic tracks and were markedly underrepresented in "advanced placement" tracks). *See also* William Darity, Jr. et al., *Increasing Opportunity to Learn via Access to Rigorous Courses and Programs: One Strategy for Closing the Achievement Gap for At-Risk and Ethnic Minority Students* 14-15 (report to the N.C. Dep't of Public Instruction, May 2001) (finding a substantial "enrollment gap" in placing talented African American, Native American, and Hispanic students into more challenging elementary, middle, and high school courses in North Carolina public schools).

[36] This state interest is significantly different, of course, from the narrower interest asserted by the University of California at Davis, which justified its special admission quota for non-white applicants on the unproven assumption that minority graduates would disproportionately return to serve minority communities. *Bakke*, 438 U.S. at 310-11. We fully expect non-white graduates of the University and the School of Law to serve the State's general need for well-trained leadership.

It is also true that subsequent research has vindicated what the University of California asserted, but failed to prove in *Bakke*: non-white applicants admitted to professional schools return disproportionately to serve non-white patients and communities. *See* Harry Holzer & David

President William Bowen and Harvard President Derek Bok reported similar findings from their extensive study of a cohort of non-white graduates of leading private and public universities. Black graduates, they found, were "much more likely than their white classmates to have taken on leadership positions in virtually every type of civic endeavor," a result that held true even when multiple regression analysis was applied to filter out other predictors of civic involvement. The authors added:

> The willingness of black . . . graduates to assume leadership roles is particularly significant in light of the role of civic participation in building a stable community structure. . .It underscores the fact that this group of well-educated individuals is charged, in effect, with twin responsibilities: not only to help build a more integrated American society, but to strengthen the social fabric of the black community.[37]

Our experience in North Carolina has been identical. That experience underlines our strong need, in light of our public university mission, to continue considering race as a factor as we make admissions decisions.

The United States has suggested, however, that although public universities do have an interest in opening themselves to "a broad and diverse array of individuals, including individuals of all races and ethnicities," and while

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Neumark, Nat'l Bureau of Econ. Res., *Assessing Affirmative Action* 57 (1999)(noting that "[t]he results show quite uniformly that 'special admit' and even more so minority physicians are more likely to treat patients who are minorities, poor . . . non-English speakers, and/or those located in rural/inner-city (or 'physician shortage') areas").

[37] William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 168-69 (1998).

this interest is "important and entirely legitimate,"[38] it should be pursued through the "variety of race-neutral alternatives available."[39]

As a constitutional matter, we believe the United States reads the Court's precedents too narrowly. In remedial contexts such as those addressed in *Croson* and *Adarand*, the search for race-neutral methods is an imperative part of narrow tailoring, since the aim is to redress wrongs to those who may have been injured with the least adverse consequences to others. Yet the Court has frankly acknowledged that some compelling ends do "permit[] unequal treatment based on race to proceed." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995). Here, when the State's interest is in assuring that some portion of its future leadership will be drawn from every racial and ethnic group, adopting "race-neutral" means to attain racial diversity is, at best, an awkward and roundabout means toward the acknowledged end.

At worst, as the examples of the United States reveal, "race-neutral" tailoring succeeds only by sacrificing the full attainment of states' admittedly compelling educational ends. Attempts to carry out race-blind admissions in Florida, Texas, and California have "succeeded"—*except* at those very states' flagship universities in Gainesville, Austin, Berkeley, and Los Angeles that constitute the preeminent source of the states' future leadership.[40] Even more

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[38] Brief of the United States as Amicus Curiae, *supra* note 12, at 9.

[39] *Id.* at 10.

[40] The United States recognizes that, under these new admissions policies, African American and Hispanic enrollment at the University of Florida has declined "slightly," from 9.95% to 7.15% for African Americans and 11.38% to 11.13% for Hispanics. Brief of the United States as Amicus Curiae, *supra* note 12, at 20. Moreover, despite an increase of 23% in the number of African American *applicants* to the University of Texas at Austin from 1996 to 2001, the number of black undergraduates actually *admitted* has declined sharply during that period, from 461 to 280. Hispanic admissions have also declined, from 1,617 to

troubling, decisions to couple guaranteed admission to some fixed percent of each state high school's graduating class strips university administrators of their traditional discretion to look beyond grades for other qualities that may be important indicators of potential promise. We *know* that some students whose high school grades land them within those artificial bounds will *not* prove the best choices for university life, just as we are sure that not all of the most promising white *or* black students *are* to be found in each high school's top 5 or 10%.[41]

1,513, over the same period, despite a 20% increase in Hispanic applications. U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* 37-39, 17-23 (2002), http://www.usccr.gov/pubs/percent2/percent2.pdf (last visited Jan. 28, 2003). In the University of California system between 1995 and 2000, the number of resident African American applicants admitted to Berkeley has declined from 566 to 338, while the number admitted to UCLA has declined from 661 to 325. Chicano admissions decreased from 1,128 to 641 at Berkeley, and from 1,452 to 849 at UCLA. Latino admissions declined from 306 to 244 at Berkeley, and from 540 to 303 at UCLA. University of California, *Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2000*, http://www.ucop.edu/news/factsheets/Flowfrc-9500only1.pdf (last visited Jan. 31, 2003) (cited in U.S. Comm'n on Civil Rights, *supra* at 23).

[41] The implicit premise of these schemes, of course, is that most neighborhoods and school districts in Florida, Texas, and California remain racially segregated in 2003, so that a rigid "race neutral" policy will yield racially diverse college classes. Those dreary assumptions may well be accurate. We are confident, however, that many excellent African American or Hispanic students who attend majority white high schools, but do not make the new arbitrary cut-offs, will not be admitted under these quota-like admission devices. Conversely, there will surely be many ill-prepared minority students from weak and underfunded high schools who will nonetheless sail into these universities—despite very low SAT scores, very poor academic preparation, and dismal prospects for success in a challenging environment—merely because they prove to be the top students from woefully bad high schools. *See generally*, Marta Tienda, et al., *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 40-44 (Jan. 21,

Even were the Texas, Florida, and California approaches a rational means to satisfy the state's interest in undergraduate diversity, the United States offers no plausible similar device to guide graduate and professional admissions. Surely public law schools will not be forced to accept the top 10% of all college graduates from every public four-year college in their State, heedless of whether those graduates majored in studio art, quantum physics, or hotel management; though such a policy could quickly fill the seats at most public university law schools, the resulting student body would have neither rhyme nor reason.

Indeed, the very readiness of opponents of affirmative action to abandon admissions officers' traditional reliance upon an array of other factors—intellectual promise, past achievement, personal character, motivation for further study, or the recommendations of teachers and mentors—in favor of an ironclad rule based on grade point percentages shows just how empty are their demands that each and every candidate be judged as an individual. In truth, the argument seems to be: "Any preference at all, any conceivable scheme, as long as non-white students get no special benefit, however small, or however crucial for the future of the state."

The Court should not accept the invitation to determine the future of all university admissions procedures by an unreflective reliance upon decisions rendered in very different contexts—public contracting, public employment, federal licensing, and the like. In each of those areas, the Court recognized that the *public*'s direct interest lay not in *who* actually performed these contracts, but ultimately, in the simple assurance that these jobs would be performed economically and well. The quality of toilets in Richmond's public jail or the safety of highway guardrails in Colorado, after all, would not be affected by the race of those who built or installed them. As the Court peered into the bottomless

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2003) (noting complex, unanticipated consequences of the new Texas admissions policies on non-white applicants).

pit of contractor preferences posed by these cases, it saw the threat of a racial spoils system unrelated to the public interest and appropriately pulled back.

Public higher education is different. The citizens of every state do have a strong present interest, and an even more profound *future* interest, in the overall selection of those who will receive higher educational benefits. That is why *Bakke* was so universally welcomed in the community of higher education, so widely adopted, so faithfully followed. It met, and still meets, the deepest social needs of our states and our nation. That is why it received bipartisan support from university presidents, deans, and administrators who differ on scores of other important university policies. Furthermore, affirmative action in higher education commands strong support among America's leading corporations[42]—no sentimentalists there, but hard headed realists who constantly assess their own and the nation's future human resource needs—and who provide further assurance, if any be required, that *Bakke* is not some faded relic from an age of bell bottoms and lava lamps.

The stakes in this case for public universities, and for the American future, could not be higher. The Court should not deprive the schools of law of this and other great public universities of a means they have found indispensable for shaping those students who, as well-trained lawyers and

[42] *See* Brief of 3M, Abbott Laboratories, American Airlines, Inc., Ashland, Inc., Bank One Corp., The Boeing Co., The Coca-Cola Co., The Dow Chemical Co., E.I. du Pont de Nemours & Co., Eastman Kodak Co., Eli Lilly & Co., Ernst & Young, LLP., Exelon Corp., Fannie Mae, General Dynamics Corp., General Mills, Inc., Intel Corp., Johnson & Johnson, Kellogg Co., KPMG Int'l, Lucent Technologies, Inc., Microsoft Corp., Mitsubishi Motor Sales of America, Inc., Nationwide Mutual Insurance Co. & Nationwide Financial Services, Inc., Pfizer, Inc., PPG Industries, Inc., The Proctor & Gamble Co., Sara Lee Corp., Steelcase, Inc., Texaco, Inc., TRW Inc., & United Airlines, Inc. as *Amici Curiae* in Support of Defendants –Appellants Seeking Reversal, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc) (No. 01-1447).

other professionals, will soon lead our states and nation into the uncharted future. We understand that federal courts should stand vigilant to ensure that the tool of race-conscious admissions be not abused. We await the day when such tools will no longer be needed. At present, however, we know no effective, tailored alternative.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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February 11, 2003